IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-958

UNITED STATES OF AMERICA,
et al.,

Petitioners,

vs.

MAX JANIS,

Respondent.

REPLY IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Burt Marks and Richard G. Sherman, on behalf of the respondent, Max Janis, reply in opposition to petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court, set forth as App. A in the Government's petition, are not officially reported. The memorandum of affirmance of the Court of Appeals, set forth as App. B in the Government's petition, is not officially reported.

JURISDICTION

The judgment of the Court of Appeals, set forth as App. C in the Government's petition, was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974, set forth in the Government's petition as App. C. By order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 2, 1975. On April 23, 1975, from request of respondent of April 21, 1975, an extension of time in which to file a response to the petition herein was granted to and including May 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a federal civil tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence seized by local law enforcement officers pursuant to a defective search warrant.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

Respondent has no quarrel with the "Statement" as set forth in the Government's petition.

REASONS FOR DENYING THE WRIT

I

THE EXCLUSIONARY RULE IS APPLICABLE TO CIVIL TAX ASSESSMENT PROCEEDINGS

The District Court below found, the Ninth Circuit Court of Appeals affirmed, and the Government does not here contend that said findings are erroneous, with the exception of course of the underlying question of the legality of the search warrant affidavit, that (1) the excise tax deficiency assessed against the respondent herein was based solely upon items obtained pursuant to the search warrant in question and upon conversations with police officers relating to the contents of these items (Finding No. 8), and that (2)

> "All of the evidence utilized as the basis of defendants' assessment

> against plaintiff was obtained directly or indirectly as a result of the search pursuant to the defective search warrant as aforesaid. Consequently, the defendants' assessment against plaintiff was based in substantial part, if not completely, on illegally procured evidence, which such evidence was seized and obtained in violation of plaintiff's Fourth Amendment rights to be free from unreasonable searches and seizures." (Finding No. 15).

The question thus squarely presented concerns the effect to be given a tax assessment based solely and exclusively upon evidence obtained from the person subject to the assessment as a result of an illegal search and seizure.

We note preliminarily that while the precise question here is one of first impression in this jurisdiction, every court which has had occasion to rule on the matter, as was detailed in the "Appellants' Opening Brief" to the Ninth Circuit Court of Appeals, at pp. 34-35,

and N. 23, and in Suarez v. Commissioner (1972) 58 T.C. 792, has ruled in conformity with the rationale employed, and result achieved, by the Courts below. Perhaps the best statement of respondent's position here is set forth in Suarez where the Court, after a closely reasoned and greatly detailed opinion, in a case on all fours with that presented here, held that the position advanced by the Government herein was fundamentally erroneous. Respondent submits that not only is Suarez therefore of strong precedential value, but further that the logic of that decision is highly persuasive on its merits, and was adopted by the Ninth Circuit Court of Appeals. Because of its importance here, the holding of the District Court below, in pertinent part, is set forth in some great detail, as follows:

> "We are confronted herein with an important and fundamental question: To what extent are the prohibitions against unreasonable searches and seizures enunciated in the Fourth Amendment to the United States Constitution applicable in a civil tax proceeding?

It is a significant question and one of first impression in this Court.

> "The Fourth Amendment provides:
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> "It has been clearly established that evidence seized in violation of a defendant's rights under the Fourth Amendment (or under the Fourteenth Amendment, where the states are involved) will be excluded in a criminal trial, whether the evidence was seized by Federal or state officials. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S.

643 (1951); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914). This exclusionary rule bars not only the evidence itself but all leads obtained therefrom, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and it applies to exclude evidence illegally obtained by state officials and made available to Federal officials, Elkins v. United States, supra.

"The Supreme Court has applied the exclusionary rule in civil proceedings which had criminal overtones or involved forfeitures. See v. City of Seattle, 387 U.S. 541 (1967); Camera v. Municipal Court, 387 U.S. 523 (1967); Boyd v. United States, 116 U.S. 616 (1886).

"Thus far, the high court has not faced the exact issue presented herein, but it has repeatedly stated that the rule's purpose is to deter unconstitutional conduct, and its prior opinions, as well as decisions by other Federal courts, clearly delineate the path we should

follow. Thus, in Weeks v. United States, supra, the Court, in commenting on the scope of protection afforded by the Fourth Amendment, stated (232 U.S. at 392):

> This protection reaches all alike whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. [Emphasis added.]

"In Silverthorne Lumber Co. v. United States, supra, a criminal case extending the protection of the Amendment to a corporation, the Court stated (251 U.S. at 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. [Emphasis added.]

"Subsequently, the Court, in Elkins v. United States, supra, noted (364 U.S. at 217):

> The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.

"And in Camara v. Municipal Court, supra, which involved a warrantless search pursuant to the San Francisco Housing Code, the Court said (387 U.S. at 530):

> [W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral". It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. [Footnote omitted.]

"The foregoing statements are a reflection of the view stated for the Court by Mr. Justice Butler some 40 years ago, that

> [t]he Amendment is to be liberally construed and all owe the duty to vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. [See Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931).]

"The Court of Appeals for the Second Circuit faced the question of the Fourth Amendment's applicability in a civil tax case in Pizzarello v. United States [39-1 USIC ¶15,886], 408 F.2d 578 (C.A. 2, 1969). That case involved a taxpayer's action to enjoin a levy of a jeopardy assessment for unpaid wagering taxes on money illegally seized by the Government. In reversing an order of the district court denying the injunction, the court said (at 586):

This case, however, while civil in nature is not between private parties and there are no analogous independent deterrents to, or remedies against, government violations of the Fourth Amendment. The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained, would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment if invalid.

"In United States v. Blank, 261 F. Supp. 180 (N.D. Ohio, 1966), the district court applied the Fourth Amendment exclusionary rule and directed that illegally seized evidence be destroyed (contraband) or returned (noncontraband) to a taxpayer who was threatened with a tax assessment. In so holding, it reasoned (at 182):

> Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses to government from complying with constitutional mandates when prosecuting their action in a civil forum. * * *

"See also the dissenting opinion of Mr. Justice Brennan, in Abel v.

United States, 362 U.S. 217, 254-256 (1960).

"Other Federal courts have indicated similar views, Knoll Associated, Inc. v. F.T.C., 397 F.2d 530 (C.A. 7, 1968) (stolen documents could not be used by the Government in an FTC proceeding); Powell v. Zurkert, 366 F.2d 634 (C.A.D.C. 1966) (discharge of a Government civilian employee); Berkowitz v. United States, 340 F.2d 168 (C.A. 1, 1975) (forfeiture); District of Columbia v. Little, 178 F.2d 13 (C.A.D.C. 1949); affirmed on other grounds, 339 U.S. 1 (1950) (housing code violation); United States v. Physic, 175 F.2d 338 (C.A. 2, 1949) (forfeiture); United States v. Butler [48-2 USTC ¶9310], 156 F.2d 897 (C.A. 10, 1946) (forfeiture); Walker v. United States, 125 F.2d 395 (C.A. 5, 1942) (forfeiture); Rogers v. United States [50-2 USTC ¶10, 777], 97 F.2d 691 (C.A. 1, 1938) (civil action to recover import duties); Laprease v. Raymours Furniture Company, 315

F. Supp. 716 (N.D.N.Y. 1970) (action to enjoin a replevia); State of Iowa v. Union Asphalt & Rocdoils, Inc. 281 F. Supp. 391 (S.D. Iowa 1968) affirmed sub nom. Standard Oil Company v. State of Iowa, 408 F.2d 1171 (CA 8, 1968) (treble damage antitrust action); United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal 1967) affd. 405 F.2d 738 (C.A. 9, 1963) (enforcement of tax lien); Lord v. Kelley [641 USTC ¶9378], 223 F. Supp. 684 (D. Mass. 1963)(action to enjoin evidentiary use of illegally seized records); United States v. One 1963 Cadillac Hardtop, 220 F. Supp. 841 (E.D. Wis. 1963)(forfeiture); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962)(action to enjoin tax assessment); United States v. $4,171.00 in United States Currency, 200 F. Supp. 28 (N.D. Ill 1961)(forfeiture); United States v. Costello, 145 F. Supp. 892 (S.D. N.Y. 1956), reversed on another issue, 247 F.2d 384 (C.A. 2, 1967) which was in turn reversed on such

other issue, 356 U.S. 256 (1958) (Denaturalization proceeding); Tovar v. Jerecki, 83 F. Supp. 47 (N.D. Ill. 1948), reversed on other grounds, [49-1 USTC ¶9218] 173 F.2d 449 (C.A. 7, 1949)(action to enjoin tax collection); Scheck v. Wara, 24 F. Supp. 776 (D. Mass. 1938) (immigration proceeding); Ex Parte Jackson, 263 F. 110 (D. Mont. 1920) (deportation proceeding). But cf. Walder v. United States, 347 U.S. 62 (1954)(use of illegally seized evidence for impeachment purposes in criminal proceeding); United States v. Schipani [71-1 USTC ¶9345], 435 F.2d 26 (C.A. 2, 1970)(use of wiretap evidence in sentencing); United States Ex rel. Sperling v. Fitzpatrict, 426 F.2d 1161 (C.A. 2, 1970)(parole revocation proceeding); NLRB v. South Bay Daily Breeze, 415 F.2d 360 (C.A. 9, 1969), certiorari denied 397 U.S. 915 (1970)(labor proceeding); Compton v. United States [64-2 USTC ¶15, 578], 334 F.2d 212 (C.A. 4, 1964)(impeachment purposes in tax assessment

proceeding).

"See also the annotation, 'Admissibility in Civil Case of Evidence Obtained by unlawful Search and Seizure,' 5 A.L.R.3d 670, 678-683, and the 1971 Supplement to 5 A.L.R.3d at pages 13-14.

"In United States v. Chase, a 1966 opinion of the District Court for the District of Columbia, unofficially reported at 67-1 USTC par. 15,733, the court stated:

It is clear that the protections of the Fourth Amendment against unreasonable search and seizure are not strictly bounded by the confines of the criminal law, but extend to certain civil proceedings. Boyd v. United States, 116 U.S. 616 (1886); Berkovitz v. United States, 340 F.2d 158 (1st Cir. 1965); Lassoff v. Gray [62-2 USTC ¶15,421], 207 F. Supp. 843 (W.D. Ky. 1962) and

cases cited at pp. 846-848. See also Annotation, 'Admissibility in Civil Case of Evidence Obtained by Unlawful Search and Seizure,' 5 ALR 3d 670, 678-83 (1966).

* * *

There is no question here but that the basis for the Government's tax assessment against Joseph Chase is evidence which it obtained in violation of the Fourth Amendment to the Constitution. There appears to be no sound reason to accord less consideration to ". . . the imperative of judicial integrity" in this proceeding than in the criminal case involving the same parties. The role of "accomplice . . . in the willful disobedience of law" is an unbecoming one for a Federal court -- regardless of the nature of the proceedings. See Elkins v. United States, * * * 364 U.S. at 223, citing McNabb v. United States,

318 U.S. 332, at 345 (1943).

"In Chase, the District Court held that a tax assessment based on illegally seized material was not admissible in evidence in a suit brought by the Government to reduce the assessment of a judgment.

"We are not unmindful of the competing considerations involved in applying the protection of the Fourth Amendment. See Amsterdam, "Search, Seizure, and Section 2255; A Comment", 112 U. of Pa. L. Rev. 378, 388-389 (1964)? But, the language of the Fourth Amendment itself admits of no distinction between searches and seizures in the context of a criminal case and those made in the context of a civil case. Indeed, it speaks in terms of the prescribed conduct or the use of the fruits thereof. Consequently our recent decisions, dealing with the inapplicability of the inhibitions of the Fifth Amendment to civil

tax proceedings, are distinguishable. Hugo Romanelli [Dec. 30, 226], 54 T.C. 1448 (1970), on appeal (C.A. 7, Aug. 11, 1970); John Harper [Dec. 30, 129], 54 T.C. 1121 (1970).

"The costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established. Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal. Moreover, we cannot ignore the additional factor that the integrity of the judicial process is also at stake. See Mapp v. Ohio supra, 367 U.S. at 639, 660 (1961); Elkins v. United States, supra, 364 U.S. at 222 (1960).

"In view of the foregoing, we conclude that any competing considerations based upon the need for effective enforcement of civil

tax liabilities (compare Elkins v. United States, supra, 364 U.S. at 222) must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for, the processes of Government. See Mapp v. Ohio, supra, 367 U.S. at 659 and Elkins v. United States, supra, 364 U.S. at 223, where the Supreme Court quoted with approval the following from the dissenting opinion of Mr. Justice Brandeis in Olmstead v. United States, supra, 277 U.S. at 485:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

"We hold that, as a matter of law, the protective rule of the

Fourth Amendment which excludes evidence illegally obtained is applicable in a civil tax case.

"In view of the fact that the officers failed to obtain warrants and failed to announce their purpose, we hold that the disputed records, upon which the respondent has based his determination, were taken from Efrain as the result of an unreasonable search and seizure in violation of the provisions of the Fourth Amendment.

"We must now consider what effect the conclusions we have reached herein have on respondent's determination in the statutory notice in this case.

"As we have already noted the parties have stipulated that the determination here is based entirely upon the items seized by the Florida and Miami officials in their raid on the clinic and leads derived therefrom. Because of our conclusion that this evidence is subject to the exclusionary rule

developed under the Fourth Amendment, we must consider Efrain's argument that the statutory notice is illegal and void, or in the alternative, that it loses its presumption of correctness.

"The respondent contends that the notice is valid because it satisfies the requirements of section 6212(a) and (b) of the 1954 Code and because it is not proper for this Court to go behind the statutory notice to examine the facts or circumstances upon which its determinations are based.

"As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of the respondent's motives or of his administrative policy or procedure in making his determinations.

"Estate of David Smith, 57 T.C. 650, 656 (1972); Arthur Figueiredo [Dec. 20, 240], 54 T.C. 1508, 1513 (1970), on appeal (C.A. 9, Oct. 14, 1970); Philip F. Flynn [Dec.

26, 237] 40 T.C. 770, 772 (1963); Charles Crowther [Dec. 22, 595], 28 T.C. 1293, 1301 (1957) afr'd [59-2 USTC ¶9607] 269 F.2d 292 (C.A. 9, 1959); Il. F. Kerr [Dec. 2062], 5 B.T.A. 1073, 1095 (1927). As we observed in Terry C. Rosano [Dec. 2062] 46 T.C. 681, 687 (1966), 'the Commissioner's determinations may often rest upon hearsay or other inadmissible evidence, and we know of no rule of law calling for a review of the materials that were before the Commissioner in order to ascertain whether he relied upon improper evidence * * *."

"We regard the general rule enunciated in the cases cited above as sound. In reality, we are not called upon to depart from that principle in the instant case in view of the fact that the respondent has admitted by stipulation the nature of the evidence upon which he relied in preparing his statutory notice.

"We are not simply confronted herein with a case in which the respondent based his determination on evidence which is inadmissible under the usual rules of evidence, e.g., hearsay. On the contrary, it must be emphasized that the respondent, in preparing his statutory notice, relied solely on the evidence which was illegally seized in violation of the provisions of the Fourth Amendment. We are therefore not dealing with a mere procedural rule of evidence. Cf. Kaufman v. United States, 394 U.S. 217, 222-225 (1968). In Estate of David Smith, supra, we stated (57 T.C. at 656):

> [I]t is well established that -- at least where unconstitutional conduct is not involved -- the courts will not inquire into the administrative policies and procedures employed by the respondent prior to making his determination. * * * [Emphasis added].

"Where infringements of constitutional rights are involved, we are convinced that the determination in a statutory notice should be carefully scrutinized and that some sanction should be imposed or discourage the Commissioner's use of and reliance on constitutionally inadmissible evidence.

"We are unable to agree, however, with the suggestion that the statutory notice here must be declared a nullity. We find no authority for this conclusion. On the contrary, Helvering v. Taylor [35-1 USTC ¶9044], 293 U.S. 507 (1935), teaches that when a petitioner makes a showing casting doubt on the validity of a deficiency determination, the statutory notice itself is not rendered void; the result of such showing is that the respondent must then come forward with evidence to establish the existence and amount of any deficiency.

See also Federal National Bank of Shawnee [Dec. 18, 032], 16 T.C. 54, 63-64 (1951).

"We are also unable to agree with petitioner's argument that the burden of proof in the case should be shifted to respondent. In situations where illegally obtained evidence has appeared, the courts have done no more than place the burden on the prosecutor to cleanse the evidence. Alderman v. United States, 394 U.S. 165, 183 (1969); United States v. Wade, 388 U.S. 218, 240 (1967); Nordone v. United States, 308 U.S. 338, 341 (1939); Baker v. United States, 430 F.2d 499 (C.A.D.C. 1970); United States v. Coplon, 185 F.2d 629, 635 (C.A. 2, 1960). See also United States v. Blue, 384 U.S. 251, 255 (1966).

"However, in the realm of the criminal law, where the exclusionary rule was born, suppression of tainted evidence serves as an effective disincentive to its use

by the Government because the Government has the burden of proof. Clearly, such disincentive does not exist in a civil tax case if the sole action taken is to suppress such evidence and the burden of proof and of going forward with the evidence remains on the taxpayer. We therefore conclude that in addition to suppression of the tainted evidence here we must also take further action.

"We believe the respondent has a duty in the case at bar not only to cleanse the evidence but also, if he wishes to be sustained in his determination herein, to present evidence to support it which is free of unconstitutional taint.

"We therefore conclude and hold that the determination before us, based entirely on constitutionally inadmissible evidence, carries no presumption of correctness. Because the presumption of correctness has disappeared, the respondent now has the burden of going forward with the

proof to establish the existence of a deficiency with independent evidence, separate and apart from the tainted evidence. See Federal National Bank of Shawnee, supra."

We think the analysis set forth above in Suarez is correct on its face and that the District Court committed no error in applying it, nor the Circuit Court in affirming the lower Court's decision. This is not to say, however, that respondent's position rests solely upon Suarez. Suarez is but one of many cases which have expressly approved the rationale employed and the results reached by the District Court here. Suffice it to say that in addition to those cases cited in Suarez and those candidly set forth in the Appellants' Opening Brief, all of which are highly persuasive, the precise contention urged by the Government here has been flatly rejected in the following decisions: Pizzarello v. United States (2nd Cir. 1969) 408 F.2d 579; United States v. Blank (N.D.Ohio, 1966) 261 F. Supp. 180, Lassof v. Gray (W.D.Ky. 1962) 207 F.Supp. 843; United States v. Chase (1966) 67-1 USTC ¶15,733.

In lieu of unduly adding to the length of this brief, by repeating the rationales therein expressed and summarized above in the lengthy Suarez quote, respondent rather would respectfully ask that this Court examine these decisions the rationales of which are here urged to be correct and controlling here.

While we think that the cases cited above and the rationales therein expressed clearly demonstrate the position which the Circuit Court did adopt, it should further be noted, that the cases relied upon by the Government in urging the opposite, upon examination, are of little weight here.

The Government appears to argue that Walder v. United States (1954) 347 U.S. 62, holding that evidence obtained in violation of the Fourth Amendment dictates of Weeks v. United States (1914) 232 U.S. 383, may nevertheless be used for impeachment purposes in a criminal trial, and Harris v. New York (1971) 401 U.S. 222 holding that evidence obtained in violation of the Fifth Amendment dictates of Miranda v. Arizona (1966) 384

U.S. 436, are by some vague undefined process transformed into decisions mandating that illegally obtained evidence may be used by the Government in a tax assessment case. If any analogy should be drawn, however, it should be drawn on a proper understanding of the existing state of the law. In Romanelli v. Commissioner (7th Cir. 1972) 466 F.2d 872, the Court of Appeal held that given Miranda and Harris, evidence obtained in violation of Miranda could not be employed in a civil tax assessment proceeding. The holding of that Court is set forth below:

> "Petitioners sought, unsuccessfully, to have the Tax Court exclude statements made by Hugo Romanelli while the agents were searching the Parkside Liquor premises. It is clear that no Miranda warnings were given. The questions are: Was Miranda applicable to the interrogation, so that his statements could not have been used to establish a criminal charge against him? If

so, could the statements be used to establish the government's case in a civil proceeding concerning tax liability?

"Miranda is applicable to an official interrogation of one who is in custody or deprived of his freedom in any significant way. Although Romanelli was not formally placed under arrest, the surrounding circumstances were at least as coercive and indicative of custodial interrogation as in United States v. Lackey where this court held Miranda warnings required. The tax court majority, although finding it unnecessary to decide whether the interrogation was custodial, suggested that it may have been. We conclude that, during the interview, Mr. Romanelli was deprived of his freedom in a significant way, within the meaning of Miranda. Thus Miranda was applicable, and his statements could not have been used by the government to establish its case

in a criminal prosecution.

"The more difficult question is whether statements made under circumstances where Miranda warnings were required but not given may be used by the government to establish civil liability of the person interrogated.

"It has not been made clear that failure to give the Miranda warnings where required does not universally require exclusion of the statements produced by the interrogation. Harris v. New York. In Harris, statements which the state could not have used, for lack of Miranda warnings, to establish its case in chief were held admissible to impeach the defendant after he took the stand and gave testimony inconsistent with the statements. A distinction was suggested between a statement the trustworthiness of which was dubious because of coercion of greater degree than official, custodial interrogation and absence of warnings

and a statement voluntary and admissible but for the lack of warnings. There is no claim here that the statements were produced by coercion of the greater degree.

"But although the statement was made in Harris, 'Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterence flows when the evidence in question is made unavailable to the prosecution on its case in chief; the context was a criminal prosecution, where the court balanced the usefulness of the defendant's statement in exposing his perjury against the deterrent effect of exclusion and contrasted that with the decision to exclude such statement from the case in chief. We do not think. in this context, that the statement made in Harris implies a rule that the only situation where failure to give Miranda warnings will ever result in exclusion is the case in chief in a criminal

prosecution. Rather, Harris focuses attention on balancing, as a matter of policy, the deterrent effect of exclusion on proscribed police conduct in the particular circumstances.

"In such balancing process, we prefer the policy judgment that exclusion from establishing the government's civil case is an appropriate and desirable deterrent. The agents were proceeding at least in the form of preliminary states of a criminal prosecution, obtaining and executing a search warrant, and presuming to restrain Romanelli's liberty for the purpose of interrogation about matters which could as well involve criminal as civil liability. They derived substantial advantage from use of their status as law enforcement officers. To permit them, so proceeding, to infringe upon Romanelli's constitutional protection against self-incrimination, to an extent that the right to use his statements

to establish a criminal charge was forfeited, but to award the advantage of using his statements in establishing civil liability seems unwholesome and an abuse of power. The balance in favor of deterrence seems significantly different from the Harris situation, where an improperly obtained statement will be useful only in the event the defendant testifies and appears to perjure himself.

"One argument made by the government is tantamount to saying that failure to give Miranda warnings produces, by virtue of the Miranda decision, an immunity from any use of statements in establishing a criminal charge, and thus the constitutional privilege is fulfilled and the resulting statement is fair game for any other purpose. Although interrogation under an appropriately drawn immunity statute might well reach that result, we do not agree that the effect of unlawful interrogation,

ostensibly for the purpose of criminal law enforcement, should be the same."

We think it here sufficient to state that if Miranda and Harris result in Romanelli it is clear that by parity of reasoning, Weeks and Walder should result in a decision in accord with that reached by the Court below. In other words, it is one thing to say that Fourth and Fifth Amendment violations do not provide a shield for a defendant to lie at will on the witness stand without fear of contradiction, and something totally different to say that the Government, because of said violations may impose and collect a tax based solely thereon.

Harris and Walder clearly were not designed or intended to lend support to the contention urged by the Government herein, and in no real way indicate that the effect to be given violations of the Constitutional guarantees is governed solely by a narrow and limited, yet extremely esoteric, test as to whether imposition of a "penalty" in a highly technical legal sense is being attempted.

The interpretation to that effect here proposed in Petitioner's Writ simply stretches too far.

Nor can the Government find any real comfort in N.L.R.B. v. South Bay Daily Breeze (1969) 415 F.2d 360. The dicta of that decision is simply too far afield to supply any solid support for the Government here.

In conclusion, perhaps it is appropriate further to note that the terms "criminal," and "quasi criminal," "forfeiture," and "imposition of a penalty" to which Fourth Amendment protections excluding evidence obtained as a result of an illegal search and seizure clearly are applicable, were not intended by the Courts authoring those relevant decisions employing those terms to establish immutable boundaries and limits. Rather, as is the well established appropriate procedure of appellate review, they were dealing with the immediate problems and issues there confronting them. To give them any different weight here, as the cases we have cited previously by their unanimity in rejecting the contention

here urged by the Government have indicated, is to read these decisions and the language there employed out of context. Any real interpretation of those terms, again as the cases cited previously indicate, must result in the conclusion that the instant proceeding is a "forfeiture" and an "imposition of a penalty" in the real context and meaning in which these terms were employed. This, in fact, was the precise holding of United States v. Blank (N.B. Ohio 1966) 261 F. Supp. 180, 182-183. The pertinent portion of that decision is set forth below:

"We must first approach the exclusionary rule under attack here by the Government. The purpose of the exclusionary rule is to put teeth into the Fourth Amendment; the rule is the only efficacious sanction whereby courts may deter the unbridled plunder of private property by law enforcement officials. As stated by the Supreme Court in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct.

1684, 1692, 6 L.Ed.2d 1081 (1961), to withhold the sanction of excluding illegally seized evidence 'is to grant the right but in reality to withhold its privilege and enjoyment.' The necessity of withholding evidence which law enforcement officials secure by illegal means 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960).

"But, argues the Government, these lofty principles have no bearing on proceeding civil in nature. The Fourth Amendment, and its handmaiden--the exclusionary rule--protect the rights of an accused only in a criminal action and restrict investigative efforts of agents only when they are engaged in the enforcement of the criminal code; there is no place

in a civil action for either, nor do they restrict the activities of agents engaged in the collection of revenue through the medium of a civil action of an administrative proceeding.

"For reasons too clear, we cannot agree with the Government. Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum. Were this not the case, all suspected violators of revenue laws would be subject to the precise evil at which the Fourth Amendment is directed -- the unreasonable disruption of the privacy of the

home--no matter how slim or unfounded might be the suspicion of their illegal activity. If there is no constitutional check on the 'investigative' efforts of federal administrative officials prosecuting civil claims, and there exist forfeiture and deficiency proceedings, civil in form, which inflict an onerous monetary penalty upon an accused which approximates the visitations of the criminal code, there is no practical restraint upon such officials. There is no rule of reasonableness. Searches can be instigated at the capricious whim of any administrative official or enforcement agent rather than as a result of the informed deliberation of 'a neutral and detached magistrate! Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). If these speculative suspicions prove to be accidentally accurate, and the invasion force discovers evidence of activity which is both offensive to the criminal code and

also indicative of evasion of taxes or tariffs accountable in a civil proceeding, the Government need not bother with criminal proceedings and may avoid the exclusionary rule embodied in Rule 41 of the Federal Rules of Criminal Procedure. If the Government's assessment of the boundaries of the Fourth Amendment is correct, then it may take the accused down a civil avenue to impose its penalties while keeping itself free from the impinging requirement of reasonableness which the Fourth Amendment imposes." (Emphasis supplied.)

"If, however, the capricious invasion of a private dwelling is mistaken, what solace is there for the unfortunate victim? What comfort does the law proffer to the innocent citizen shaken by the felonious intrusion of his hearth? None. What deterrent against this unreasonable activity of the government does the law offer to the innocent? None, if the

government has described accurately the perimeter of the Fourth Amendment and the correlative utility of the exclusionary rule. The argument advanced by the Government cannot withstand the searchlight of common sense nor can it be reconciled with the latest pronouncement on the subject by the United States Supreme Court. For these reasons we must reject the Government's argument that they may use admittedly illegally seized evidence in an assessment proceeding."

II

THE DISTRICT COURT BELOW INVOKED THE PROPER PROCEDURAL REMEDIES

The real but unstated complaint of the government here is simply that even if this Court should determine that the exclusionary rule is applicable, Fourth Amendment guarantees and protections should nevertheless give way to procedural niceties of tax litigation. In other words, even if the Fourth Amendment is applicable, it should not be implemented.

A.

THE REFUND

The holding of the District below was that

> ". . . where, as in this case, illegally obtained evidence constitutes this basis of a federal tax assessment, plaintiff is not required to prove the extent of the refund to which he claims he is entitled. It is sufficient that plaintiff prove that substantially all, if not all,

the evidence upon which the assessment was based, was the result of illegally obtained evidence." (C.T. 474)

The sole contention of the government here is that this holding is erroneous in light of the rule that, "in a refund action in a federal tax proceeding, the burden is upon the claimant not only to show that the assessment is erroneous but also the correct amount of refund to which he is entitled. (citation)." (A. O.B.58). The government, however, cites no authority for this proposition in the setting of funds obtained pursuant to an assessment which assessment is based solely upon evidence obtained as the result of an illegal search and seizure. And while the government asserts that Compton v. United States, (4th Cir. 1964) 334 F.2d 212 expressly so held, a reading of that decision reveals, at p. 217, that no evidence there so obtained was introduced at trial, and the Court there explicitly refrained from passing upon that question.

The appropriate case law dealing with

evidence obtained as the result of an illegal search and seizure, rather, indicates that the approach of the Court below, or one equally protective of the rights of persons assessed, should be adopted.

In this light it should first be noted that the government's attempt to present the appearance of error by suggesting that the proper action for the Court to have taken was to shift the burden of proof and permit the government to go forward and produce whatever untainted evidence they had, is simply an inartful attempt to create a strawman. At no time was this procedural maneuver suggested below and nowhere in that record is there even the slightest indication that it desired to put on any such evidence. In this context we think this belated argument is without merit. In this context both Suarez and Pizzarello strongly support the action taken by the Court below, relieving respondent of the burden of coming forward with evidence and showing, as a pre-requisite for relief, what the correct tax should be.

Suarez held, not that the burden of proof should be shifted, but given that the determination of taxes owed was based solely upon illegally obtained evidence, the burden of going forward with evidence should be shifted. This is in effect, however, the type of action taken by the Court below, for it was clear to all parties that the government possessed no independent untainted evidence. The end result, of course, therefore, should be the same in both cases. The same tact was taken in Pizzarello, which indicates that the burden of showing what tax is due is in fact correlative only of the presumption of correctness of the assessment, and that once the assessment is shown to be invalid because based solely upon illegally obtained evidence, the taxpayer satisfied his burden, and the presumption of correctness disappears.

This is not to say, however, that the rationale behind the reluctance of the Court to make the plaintiff establish the correct amount of tax due, where the tax was assessed solely on the basis of illegally obtained evidence, stems only from

the Fourth Amendment, although it is submitted that no further support is required. Rather, additionally, Fifth Amendment considerations further come into play.

In the instant case, requiring the plaintiff to establish the amount of the refund to which he is entitled would be too harsh indeed in that it would force the plaintiff to make a choice between forfeiture of his money or the very real possibility of subjecting himself to criminal liability. It is well established, however, that compelling a person to make such a choice would be unconsitutional in that it would be violative of that person's Fifth Amendment rights.

In Garrity v. New Jersey, 385 U.S. 493, 17 L.Ed.2d 562 (1967), the Court held at 385 U.S. 565-566 that where the petitioner was forced to make a choice between self incrimination or job forfeiture such compulsion by the state was unconstitutional:

> "The option to lose their means of livelihood or to pay the penalty of self-incrimination is

the antithesis of free choice to speak out or remain silent."

In the case of Spevack v. Klein, 385 U.S. 511, 17 L.Ed. 574 (1967), the Supreme Court, citing Malloy v. Hogan, stated at 385 U.S. 514:

> "The fourteenth amendment secures against state invasion the same privileges that the fifth amendment guarantees against federal infringement - the right of a person to remain silent unless he choses to speak in the unfettered exercise of his own will and to suffer no penalty...for such silence." (emphasis supplied)

The Court in Spevack went on to state at 385 U.S. 515 that in this context "penalty is not restricted to fine or imp. sonment. It means ... the imposition of any sanction which makes assertion of the fifth amendment 'costly.'"

In DeAntonio v. Solomon, 42 F.R.D. 320 (1967), the United States District

Court for Massachusetts upheld a defendant's refusal to answer allegations of a civil complaint which would have tended to incriminate the defendant and subject him to possible prosecution for adultery. The Court stated at 42 F.R.D. 322:

> "Both motions of the plaintiff (one of those motions being a motion for summary judgment based on defendant's failure to answer said complaint) have effectively been determined by two decisions of the Supreme Court of the United States promulgated since this Court's previous memorandum, Spevack v. Klein (citations omitted). It would be inconsistent with these decisions for this court to default the defendant for exercising his privilege against self-incrimination under the circumstances of this case. Such a sanction would make the assertion of that privilege indeed 'costly' and would be the kind of watering down of the

privilege which the Supreme Court has clearly proscribed."

In the instant case, plaintiff must assert the Fifth Amendment, and, as such, refuse to testify. His dilemma is indeed real as the government would contend that plaintiff must testify to his alleged wagering activities in an effort to establish the amount of refund to which he is entitled.

In Pizzarello v. United States, 408 F.2d 579 (1969), the Court dealt with a similar situation. The Court stated at 408 F.2d 586:

"Appellant argues, nonetheless, that this legal remedy is inadequate because compliance with the burdens imposed on a taxpayer seeking a refund would open him to substantial hazards of self-incrimination. He states he would no more be able to realistically recover his money in a suit for refund on a single wagering transaction than he would for a refund if he had

paid the entire amount, without making himself vulnerable to state or federal prosecution for illegal gambling activity. He contends that in such a suit he has the burden not only of proving the assessment invalid, but also of proving the amount, if any, to which the Government is properly entitled. To meet the second burden, he asserts that he would have to testify to his gambling activities, thereby exposing himself to prosecution in New York. His sole alternative allegedly would be to forfeit the $125,882."

The Second Circuit in Pizzarello was dealing with the issue of the adequacy of a legal remedy with regard to equity jurisdiction and therefore did not make a decision with regard to the constitutionality of such a burden. However, the Court implied that such a burden would be unconstitutional. In this connection the Court stated at 408 F.2d 586:

"The situation facing Pizzarello is not too dissimilar from that presented to the Seventh Circuit in United States v. Coin and Currency in the amount of $8,674.00, 393 F.2d 499 (7th Cir. 1968), where the Court said: 'The prospect of a felony conviction involved in Marchetti of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, is controlling. Boyd was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments.'

See Garrity v. State of New Jersey, 385 U.S. 493, 496-497, 87 S.Ct. 616, 17 L.Ed.2d 562, which reaffirms and follows Boyd." (emphasis supplied)

It is clear that in the Pizzarello case, the Second Circuit, by analogizing the United States Coin and Currency case and the Boyd and Garrity cases, indicated that in a refund situation which would in effect require the plaintiff to make a choice between exposing himself to criminal liability or to forfeit his money, the plaintiff would not and could not be forced to make such an election.

In McAllister v. Cohen, 308 F.Supp. 517 (1970), the Court in discussing the Pizzarello case, stated at 308 F.Supp. 523:

"... his burden of proof in a refund suit would cause him to lose his privilege against self-incrimination and would, therefore, subject him to possible prosecution by the New York State authorities. While it

is not shown what, if any, safeguards are provided by the state of New York against compulsory self-incrimination, we agree with the reasoning of the Fifth Circuit in Campbell v. Guertersloh, 387 F.2d 878, 881 (1961) cited with the approval by the Zamaroni Court, that this Court should not attempt to control the admission of proof before the administrative agency completes its lawful functions. This could best be done in the tax refund action." (emphasis supplied)

The Court in McAlister, supra, held that it would not enjoin the Internal Revenue Service from proceeding on its assessment on the ground that the burden would be unconstitutional, and that the question of the constitutionality of the burden should more properly be determined in a tax refund action. It is to be noted that in the present case plaintiff first sought injunctive relief and subsequently amended his complaint to its

present posture, to wit, an action for tax refund.

Finally, the government appears to urge that it is possible that the plaintiff would not incur any possible criminal liability by testifying or coming forward with evidence due to the fact that the California statute of limitations with respect to bookmaking may have expired. This contention overlooks the fact that the statute of limitations is an affirmative defense which should be properly raised at the appropriate time by competent counsel. However, there are numerous instances in which the period of limitations is tolled. For example, the statute of limitations is tolled when a defendant is outside the jurisdiction. In the instant case, there is nothing in the record to establish whether or not any of the elements of tolling are present. Thus, merely because it appears that on its face the period of limitations may have expired, there may be circumstances which would deprive Mr. Janis of successfully asserting the defense of statute of limitations.

The potential criminal liability which the plaintiff herein seeks to protect himself against by asserting his Fifth Amendment rights is not necessarily criminal liability for illegal wagering activities under the laws of the State of California. Assuming the plaintiff had been engaged in illegal wagering activities, these activities would necessarily have to be reflected on various tax returns to be filed pursuant to Title 26 of the United States Code (the Internal Revenue Code). Thus, the plaintiff herein would have potential criminal liability under 26 U.S.C. §7201 (attempt to evade or defeat tax), 26 U.S.C. §7203 (willful failure to file return, supply information, or pay tax), and 26 U.S.C. §7206 (fraud and false statements). In addition thereto, the plaintiff would have potential criminal exposure under 18 U.S.C. §1955 (prohibition of illegal gambling business) and under various sections of the California Revenue and Taxation Code. A thorough analysis would undoubtedly reveal many more possible violations. However, the potential

criminal jeopardy mentioned above suffices to establish that if the plaintiff were compelled to testify in order to protect his economic interests, he would be subjecting himself to extensive criminal liability.

It should be constantly remembered that the instant case is not the typical tax assessment case. We do not have a situation where the assessment is merely arbitrary and erroneous. The assessment in this case was not only arbitrary and erroneous, but was based solely upon illegally obtained evidence procured in violation of the taxpayer's constitutional rights. Thus, because the plaintiff's tax assessment was based solely upon illegally procured evidence, the assessment was invalid as a matter of law.

Berkowitz v. United States (1st Cir. 1965) 340 F.2d 168, was a proceeding on the government's libel for forfeiture of money in violation of Internal Revenue laws. The First Circuit held that the government should not be permitted to enforce a forfeiture of money assertedly

used in violating Internal Revenue laws when it discovered and seized that money only by virtue of a direct invasion of the owner's constitutional rights in an unlawful arrest incident to which the money was seized. The fact that Berkowitz, supra, involved a forfeiture under the Internal Revenue Code is the only distinguishing feature between that case and the situation before this Honorable Court. Here, as in Berkowitz, supra, a governmental agency seized money in violation of the owner's constitutional rights in an unlawful arrest incident to which the money was seized. In the case at bar, the seizure by the Internal Revenue Service is not denominated a "forfeiture" as it has been made pursuant to §6331 of the Internal Revenue Code, while a seizure of property subject to forfeiture under the Internal Revenue Code is made under §7321 thereof. From a practical standpoint, there is no difference between a seizure under either section. In Berkowitz, supra, the government confiscated Berkowtiz's funds, while in the instant case the government

confiscated Janis' funds. Berkowitz prevailed in his case merely by showing that such confiscation was incident to an unlawful arrest. Why then should Janis not prevail herein by merely showing that such confiscation was incident to an unlawful arrest?

The requirement that the plaintiff come forward herein in order to prove the extent of the refund to which he is entitled would allow a wrongdoer to profit from its wrongs. The defendant has seized funds which were illegally in the possession of another governmental agency. The defendant has made a tax assessment based solely upon illegally obtained evidence. Nevertheless, the defendant is now asserting that the plaintiff must prove that the defendant is not legally entitled to retain that which it (the defendant) illegally acquired in the first place.

We have previously mentioned the rationale of the requirement that the taxpayer come forward to sustain his burden in an action for refund. As the

Court stated in Bar L Ranch v. Phinney (5th Cir. 1970) 426 F.2d 995, 999, "the action for refund of taxes is in the nature of a common law action for money had and received and is governed by equitable principles." This characterization of a refund action as being governed by equitable principles is long-standing and needs no additional authority. Applying this characterization to the case at bar, it becomes apparent that:

1. The wrongdoer (the defendant) should not profit from its wrongs.

2. The claimant (the plaintiff), having established that the seizure of his funds and the tax assessment were both made in derogation of his constitutional rights, should not be required to come forward with any additional evidence in order to prevail.

3. The assessment, being solely the product of illegally obtained evidence, must necessarily be null and void, and any funds collected thereunder should be returned to the plaintiff.

The irony of the present case is

that if the plaintiff herein were proceeding in the Tax Court of the United States, he would necessarily prevail by merely showing that the assessment was based solely upon illegally procured evidence. Suarez v. Commissioner, supra. However, in an excise tax case such as the one before this Honorable Court, there are no mechanics for proceeding in the Tax Court of the United States. The only forums in which a tax payer can have recourse in such a case is either the United States District Court or the United States Court of Claims. Thus, if this were an income, estate or gift tax case, the plaintiff could proceed in the Tax Court and prevail. Should the result be different merely because it is an excise tax case?

B.

THE COUNTERCLAIM

The holding of the Court below was that:

"...the defendants' counter-claim should be dismissed with

prejudice as said counterclaim seeks to reduce to judgment a federal tax assessment which was based substantially all, if not all, upon illegally obtained evidence."

Any requirement that the taxpayer come forward in an action for refund is not applicable to the situation where the government seeks to establish the validity of its assessment and to collect the taxes allegedly due with respect thereto. A suit wherein the government is either a plaintiff or a counterclaimant is not a suit in the nature of a common law action for money had and received. Where a taxpayer is defending such a suit, he need only show that the government's assessment was arbitrary. Upon such a showing, the burden is then upon the government to establish whether any deficiency exists, and, if so, in what amount. Bar L Ranch v. Phinney, supra, at page 999; United States v. Lease, 346 F.2d 696, 701 (2nd Cir. 1965). Applying the

foregoing principles to the case at bar, it is clear that the plaintiff correctly prevailed on the defendant's counterclaim as he has sustained his burden and established that the underlying assessment which is the basis of the counterclaim was solely the product of illegally obtained evidence. Consequently, the burden of proof and the burden of coming forward with respect to any possible deficiency under the counterclaim was, therefore, upon the defendant. Since the counterclaim was based solely upon evidence procured in violation of the plaintiff's constitutional rights, it is respectfully submitted that for the reason stated in Suarez and for the cases cited therein, the action of the Court below dismissing that counterclaim was eminently correct. Simply stated, with respect to the counterclaim by the government, any burden the defendant might have is satisfied when it is shown that the only proof of a purported tax liability was obtained as the result of an illegal search and seizure which was in

turn the sole basis of any assessment. As it was clear that the government could produce no other evidence, the counterclaim was properly dismissed.

CONCLUSION

For the reasons stated above, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

BURT MARKS

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